Supreme Court, U.S.
FILED
DEC 15 1994
OFFICE OF THE CLERK

(H) (3)

Nos. 94-805, 94-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANN RICHARDS, GOVERNOR OF TEXAS, *et al.*,
Appellants,

v.

AL VERA, *et al.*

REV. WILLIAM LAWSON, *et al.*,
Appellants,

v.

AL VERA, *et al.*

On Appeal from the United States District Court
for the Southern District of Texas

JOINT BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Introduction

In view of appellees' joinder of our Jurisdictional Statements in the Motion to Affirm, appellants in No. 94-805 (collectively referred to as "the State") and No. 94-806 (collectively referred to as the "Lawson/LULAC Intervenors") file this joint brief in opposition to the Motion to Affirm.

All parties to this appeal agree on one point: the case merits plenary consideration by the Court. This case provides an opportunity for the Court to address important, unresolved issues not raised in other pending appeals, including *Louisiana v. Hays*, which the Court has indicated it will hear on the merits, *appeal pending*, Nos. 94-627, 94-558, Order (Dec. 9, 1994).[1] As stated by appellees, this appeal "presents an appropriate vehicle for the Court to provide useful additional guidance to state legislatures and lower courts." Motion to Affirm at 2. Appellees further state: "This case is unlike ... other [pending cases] in that it involves ... an urban context. Moreover, the State here admittedly rejected more compact alternatives. ... Thus, regardless of whether the Court chooses to review any of the other pending cases, this case presents discrete and important questions concerning the proper application of *Shaw*, and warrants ... plenary review." *Id.* at 13. This unanimity among opposing parties on the value of plenary review strongly supports the conclusion that the Court should note probable jurisdiction.

Argument on the Merits

1. *Inappropriateness of strict scrutiny.* One unique question presented here is whether small, single-urban-area congressional districts, which are the three *least segregated* districts in Texas, fall within the ambit of *Shaw v. Reno*. *Shaw* expressed concern about "an effort to segregate the races for purposes of voting," by joining together "individuals who belong to the same race, but who are *otherwise widely separated by geographical and political boundaries*." 113 S. Ct. 2816, 2824, 2827 (1993) (emphasis added). These localized districts, which unite voters with strong common interests, are not properly subjected to strict scrutiny.

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[1]The United States has stated its view that this case raises important issues not presented in other cases and that probable jurisdiction should be noted. Jurisdictional Statement, *United States v. Vera*, No. 94-988 (filed December 1, 1994).

Appellees devote approximately half of the Motion to Affirm to proof of the uncontested fact that the State considered race in developing its districting plan. Most of the remainder of the Motion to Affirm is devoted to derogatory descriptions of the shapes of Districts 18, 29 and 30.[2] What appellants have not established is the needed *connection* between the State's race-consciousness in districting and the irregular shapes of the three invalidated districts.

In asserting, without proof, that the shapes of the three challenged districts were caused by a goal of racial segregation, appellees ignore at least two dispositive facts. First, the court below found that alternative, regularly-shaped versions of these districts were possible, but were rejected *because they would have destroyed incumbents' opportunities for re-election*. *E.g.* State J.S. App. 49a (then-Senator Eddie Bernice Johnson's plan opposed by white incumbents, "[w]hile minority voters did not object").

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[2]Appellees focus enormous effort on an uncontested point -- that congressional districts in Texas are irregularly shaped. The Almanac of American Politics (1994), one of appellees' sources, describes *majority-white* Congressional District 6 as follows: "The 6th is the descendent of a district that stretched across rural territory from Houston to Dallas-Fort Worth, and was represented from 1978 to 1984 by Phil Gramm. ... Its *convoluted* boundaries were drawn by Democrat Martin Frost, but to accommodate Republican Congressman Joe Barton." *Id.* at 1224 (emphasis added). The Almanac also comments on another *majority-white* district: "The 3d Congressional District['s] ... *boundaries are so convoluted as to defy easy description*. ... A narrow corridor connects [affluent north Dallas neighborhoods with] most of the upscale suburbs of Garland and Richardson; from there one salient heads south ... while another heads north. ... Politically, all these areas have one thing in common; they are among the most heavily Republican territory in the U.S." *Id.* at 1217-18 (emphasis added). The Almanac describes the *majority-white* 21st district as follows: "[A]s with so many Texas districts after the 1991 redistricting, its boundaries are quite complex." *Id.* at 1258.

Appellants make a weak effort to argue that the alternative plans were rejected because their minority population percentages were not "safe" enough. The district court made no such finding. The record overflows with evidence, including testimony of appellees' own witnesses,[3] that regularly-shaped, alternative versions of Districts 18, 29 and 30 were rejected because of their significant detrimental impact on incumbents or, in the case of the Martinez plan, their impact on an aspiring white State Senator.

Appellees' claim that the goal of a higher minority population proportion caused irregularities in the shapes of Districts 18, 29 and 30 also is refuted by the existence of regularly-shaped, alternative versions of the these districts with virtually *the same proportions of the protected group*. Trial exhibits show how Districts 18, 29 and 30 each would have looked if racial composition had been the only influence, other than maximizing regularity of shape. State Exs. 12A, 12B, 12C. The Motion to Affirm fails to mention these exhibits.[4]

The second central fact ignored in the Motion to Affirm is the highly irregular shape of numerous *majority-white* congressional districts in Texas. Appellees have abandoned their cross-appeal of the lower court's validation of the *majority-white* districts. Thus, those districts have been finally and specifically adjudicated to be constitutional.

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[3]*See* Testimony of Representative Kent Grusendorf, TR I-81 ("The driving force for the crazy lines that you find in north Texas are an effort to save Martin Frost." (Frost was a white incumbent.)).

[4]In addition to the hypothetical versions of Districts 18 and 29, which overlap somewhat, other alternative districts in the record show that reasonably compact, non-overlapping versions of these districts, with roughly the same African American and Hispanic population percentages, could have been drawn. For example, State Senate districts in the Houston area, with about the same population as congressional districts, include both an African American and a Hispanic district. *See* State Exs. 16D, 16G.

The irregular shapes of the constitutionally-valid, majority-white districts demonstrate that, despite appellees' derogatory labels, for Texas congressional districts the shapes of Districts 18, 29 and 30 are not "unusua[l]," *Shaw*, 113 S. Ct. at 2820. The lower court described the congressional districting plan, which includes 21 majority-white districts, as "a crazy quilt ... that more closely resembles a Modigliani painting than the work of public-spirited representatives." State J.S. App. 8a. The "crazy quilt" plan chosen by the Legislature establishes that minority opportunity districts are not departures from standard state districting practices and therefore do not raise the "bizarreness" concerns identified by *Shaw v. Reno*.

The irregular shapes of majority-white congressional districts also demonstrate the lengths to which the Legislature was willing to go to protect all incumbents. The majority-white districts provide further proof that incumbent protection, and not race, was the overriding, "but for" cause of *all* the irregular shapes of Texas congressional districts, including Districts 18, 29 and 30.

2. *Compelling state interest*. The court below did not find that the invalidated districts are unsupported by a compelling interest. Nonetheless, appellees contend that the State did not prove the existence of racially polarized voting and thus had no compelling state interest in complying with the Voting Rights Act.

Lay witness testimony, as well as strong evidence presented at trial by experts for both the State and the appellees, established that voting is racially polarized in all three of these congressional districts.[5] Additionally, prior

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[5]Appellees incorrectly claim that the election of the African American voters' candidates of choice in District 18 shows that "[a] significant number of Anglo voters in Texas support African American and Hispanic candidates." Motion to Affirm at 2. District

(continued...)

to the creation of District 30, the federal court in *Williams v. City of Dallas*, 734 F. Supp. 1317 (N.D. Tex. 1990), had just made extensive, detailed findings of fact on the existence of severe racially polarized voting and other political disadvantages suffered by African American voters in Dallas.

Appellees also contend that a compelling interest is lacking because the shapes of Districts 18, 29 and 30 do not satisfy the compactness requirement of *Thornburg v. Gingles*, 478 U.S. 30 (1986). The shape of the remedial districts actually adopted by the State is irrelevant to the compelling interest issue. The prima facie case under *Gingles* is made with a *hypothetical* district. The law explicitly permits the State to design its own remedial district, which need not conform to the *hypothetical* district used as a tool to evaluate liability. *White v. Weiser*, 412 U.S. 783, 795 (1973); *see also Growe v. Emison*, 113 S.Ct. 1075, 1081 (1993).

3. *Narrow tailoring*. The Motion to Affirm repeats the reasoning of the court below that narrow tailoring requires the State to maximize regularity of district shape, to the exclusion of all other interests determined by the State

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[5](...continued)
18 is a majority-minority district and in the 1970's and 1980's, African Americans and Hispanics voted cohesively. Thus, the success in District 18 does not shed light on Anglo voting patterns.

Appellees rely on the document set out as Appendix C to their Motion to Affirm as proof of significant white cross-over voting. To the best of our knowledge, the basis of this document was never explained at trial and it is not self-explanatory. Without conceding that the information in Appendix C is accurate, it is clear that this document includes elections in which two white candidates ran against each other. Fifth Circuit precedent holds that white-on-white elections should not be used to contradict evidence of racially polarized voting in elections in which a minority candidate is the candidate of choice of the minority voters. *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503-04 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989). *See also* PX 13C, at 70.

to be important. The United States' Jurisdictional Statement explains in detail why this interpretation of *Shaw v. Reno* is in error. *See* Jurisdictional Statement, *United States v. Vera*, No. 94-988 at 11-16. *See also* State Jurisdictional Statement at 13-15, 17-19; Lawson/LULAC Jurisdictional Statement at 19-22.

Appellees also claim that the minority population proportions in Districts 18, 29 and 30 are too high and overly safe. Yet, Districts 18 (48.6%) and 30 (47.1%) are both less than 50% in African American voting age population.[6] Although Hispanic residents comprise 55% of District 29's voting age population, in the two elections that have occurred thus far, Hispanic voters have not been able to elect their candidate of choice.[7]

4. *Standing*. Appellees claim that the stigma of race-conscious districting injures them. Motion to Affirm 15. The Court in *Allen v. Wright*, 468 U.S. 737 (1984), rejected such stigmatic harm as inadequate to establish standing. That ruling regarding stigmatic injury and standing should apply to white citizens alleging discriminatory governmental action in districting in the same manner that it applies to African American citizens challenging discriminatory governmental action in education, since both claims arise under the Fourteenth Amendment.

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[6]Following Fifth Circuit precedent, the State reasonably concluded that a goal of 50% population of a single minority group was required by the Voting Rights Act. *See Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989).

[7]Since the 1991 redistricting, a white candidate, Congressman Gene Green, has twice won election in District 29. Both times, Green had a Hispanic opponent in the Democratic primary. Analysis of election return data shows that Congressman Green was not the candidate of choice of the majority of Hispanic voters in those races.

Appellees also claim that the irregular shapes of the challenged districts created barriers to their political participation. Harm sufficient to establish standing is a factual matter that must be proved. Neither plaintiffs nor the lower courts may simply *assume*, based on general political theory or preference, that an irregularly-shaped district harms the voters or their relationship to representatives. Indeed, based on an extensive evidentiary record, the District Court for the Eastern District of North Carolina made precisely the opposite finding of fact. *Shaw v. Hunt*, 861 F. Supp. 408, 471 (E.D.N.C. 1994), *appeal pending*, No. 94-923 ("There is no convincing evidence in the record that the irregularities and lack of geographical compactness of these two districts have had or are having any significant adverse effect upon their citizens' interests in fair and effective representation -- in matters either of voting or access to their elected representatives. Indeed, such evidence as there is on the matter preponderates in the other direction.").

Appellees erroneously rely on *Shaw v. Reno* as conclusively establishing harm, as a factual matter, in any case in which a plaintiff challenges race-conscious districting. The opinion in *Shaw* did not hold, *as a matter of nationwide factfinding*, that all members of Congress elected from irregularly-shaped, majority-minority districts will "represent a particular group rather than their constituency as a whole." Motion to Affirm 14 (quoting *Shaw v. Reno*, 113 S. Ct. at 2828). Rather, the Court indicated that such a result is "threaten[ed]." *Id.* The reality of this "threat" still must be proved as a matter of fact in each particular case, both to establish standing and to sustain the merits of a *Shaw* claim. The uncontradicted evidence in this case proves precisely the opposite. For example, even plaintiffs agree that District 18's Congresswoman-elect, Sheila Jackson Lee, "will reach out to white voters and try to

build racial bridges." Thomas Dep. 74.[8] Plaintiffs suffer no harm which this lawsuit will remedy concerning the inclusiveness and responsiveness of minority members of Congress from Texas.

Conclusion

For the reasons stated in the Jurisdictional Statements and herein, the Court should note probable jurisdiction.

Respectfully submitted,

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[8]In one example of appellees' reliance on factual matter not in the record, the Motion quotes a statement allegedly made by District 18's defeated Congressman, Craig Washington. Motion to Affirm at 21. If this statement was made by Congressman Washington, a fact on which the record sheds no light, appellants had no opportunity to conduct cross-examination or to subject this alleged statement to any scrutiny, and it must be disregarded as not part of the factual record before the lower court or this Court. —

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